(17) ✓

FILED
JAN 22 1945
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 858

ILLINOIS COMMERCE COMMISSION, ET AL.,
Appellants,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT AS TO JURISDICTION

George F. Barrett,
Attorney General of Illinois,
Counsel for Appellants.

INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Statement that the instant case is one of five companion cases	1
Reference to the federal statutory provision believed to sustain this Court's jurisdiction on direct appeal	2
Reference to the statute of Illinois, the validity of which is involved	2
Reference to the title of the judgment sought to be reviewed and the date upon which the application for appeal is presented	3
The nature of the cases and the rulings of the court which were such as to bring the cases within the jurisdictional provisions relied upon	4
Specifications to the stage of the proceedings and the manner in which the federal questions sought to be reversed were raised	6
Showing that the questions involved are substantial	8
Conclusion	17
Appendix "1"—Applicable Procedural Regulations	18
Appendix "2"—Opinion of the Supreme Court of Illinois in the cases of Fleming, et al. v. Illinois Commerce Commission	19
Appendix "3"—Opinion of the Supreme Court of Illinois in the case of Illinois Commerce Commission v. Illinois Central Railroad Co.	39

Table of Cases Cited

Clausen v. *Department of Finance*, 377 Ill. 399	7
Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591	13, 16
Federal Power Commission v. *Natural Gas Pipeline Co.*, 315 U. S. 575	16

Page

Northern Pacific Railway Co. v. *Department of Public Works of the State of Washington*, 268 U. S. 39..... 13
Northern Pacific Railway Co. v. *North Dakota*, 236 U. S. 586..... 12,16

Statutes Cited

Constitution of the United States, Article VI, Section 2. 3
Directive No. 1 of the Director of Economic Stabilization..... 5
Emergency Price Control Act, as amended..... 3
Illinois Public Utilities Act, Chapter 111 2/3, Paragraphs 1–95..... 3
Judicial Code, Section 237 (28 U. S. C. A. 344)..... 2
Procedural Regulation No. 11 of the Office of Price Administration..... 5
Rules of the Supreme Court of Illinois, Rule 39..... 7

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 858

ILLINOIS COMMERCE COMMISSION,
Appellant,

vs.

ILLINOIS CENTRAL RAILROAD COMPANY,
Appellee.

APPEAL FROM SUPREME COURT OF ILLINOIS. NO. 27768

JURISDICTIONAL STATEMENT OF APPELLANT

The appellant, Illinois Commerce Commission, presents this jurisdictional statement in accordance with the provisions of Rule 12 of the Rules of this Court.

Statement That the Instant Case Is One of Five Companion Cases

The instant case is one of five companion cases,* all of which present one question which is identical in all of the cases and further questions which are not identical but which are similar in all cases. These five cases, including the instant case, are identified by their title and number in the

---

* (Clerk's Note—The jurisdictional statements in the companion cases Nos. 859-862, are identical with this statement and are not printed.)

Supreme Court of the State of Illinois in the margin.[1] The jurisdictional statements in all five cases are identical since the variations in the evidence in the cases do not affect jurisdictional questions.

Reference to the Federal Statutory Provision Believed to Sustain This Court's Jurisdiction On Direct Appeal

As more fully appears from the suggestions hereafter set forth in this statement, jurisdiction by direct appeal to this Court, as distinct from jurisdiction to grant a writ of certiorari, is believed to be sustained by Section 237 of the Federal Judicial Code (U. S. Code Ann., Title 28, Section 344). More particularly it is contended that, in the language of the section above cited, this case is one in which "is drawn, in question the validity of a statute of" the State of Illinois "on the ground of its being repugnant to the Constitution, * * * or laws of the United States, and the decision is in favor of its validity, * * *."

Reference to the Statute of Illinois, the Validity of Which Is Involved

As more fully appears from the suggestions appearing later in this statement, the first question which will be presented, if this appeal is allowed, which question is identical in all of the five companion cases, is whether the Illinois Public Utilities Act, as construed by the Supreme Court of the State of Illinois in this case and as applied on such construction to the facts in this case, is, to the extent only

---

[1] *Illinois Central Railroad Co.* v. *Illinois Commerce Commission*, No. 27768; *Fleming et al., Trustees of Chicago, Rock Island and Pacific Railroad Co.*, v. *Illinois Commerce Commission*, No. 27894; *Chicago, Burlington and Quincy Railroad Co.* v. *Illinois Commerce Commission*, No. 27895; *Scandrett et al.* v. *Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Co.* v. *Illinois Commerce Commission*, No. 27896; *Sprague et al., Trustees of Chicago, North Shore and Milwaukee Railroad Co.* v. *Illinois Commerce Commission*, No. 27898.

that it has been so construed and applied, in conflict with the provisions of the Emergency Price Control Act of the United States Congress, and therefore insubordinate to Paragraph 2, Article VI of the Constitution of the United States which provides that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * shall be the Supreme Law of the Land; * * *." The official citation of the Illinois Public Utilities Act, Chap. 111⅔, Paragraphs 1-95, both inclusive, of the Illinois Revised Statutes for 1943 (page 2498) (the original text of this Act will be found in Illinois Session Laws for 1921 at page 702, *et seq.*).

The Illinois Public Utility Act is the Act creating the Illinois Commerce Commission and bestowing upon that Commission its powers. The Act authorizes the Commission, among other things, to approve increases in rates.

The provisions of the Emergency Price Control Act with which it is contended that the construction and application of the Illinois Public Utilities Act in the present case conflict is Public Law No. 729, 2nd Section, entitled, "An Act to amend the Emergency Price Control Act of 1942, to aid in the preventing inflation, and for other purposes," and particularly that proviso thereof hereafter discussed.

Reference to the Title of the Judgment Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The judgment in the case of *Illinois Central Railroad Company* v. *Illinois Commerce Commission* in the Illinois Supreme Court, No. 27768, was rendered on May 16, 1944, but rehearing was not denied until September 18, 1944. The judgments in the other four cases were rendered on Sep-

tember 19, 1944. No petition for rehearing was filed in these latter cases.

Application for appeal to the Supreme Court of the United States is presented to the Supreme Court of Illinois on September 29, 1944, within ninety days after the petition for rehearing was denied in the *Illinois Central* case, and within ninety days after the rendition of final judgment in the other four cases.

The Nature of the Cases and the Rulings of the Court Which Were Such as to Bring the Cases Within the Jurisdictional Provisions Relied Upon.

In each of the five cases a railroad company or its trustees in bankruptcy filed with the Illinois Commerce Commission a schedule of proposed increased rates, fares and charges for intrastate suburban commutation fares, such schedules being in each case filed prior to the effective date to the amendment of the Emergency Price Control Act cited above and relied on in the respect hereafter set forth. The fares sought to be increased were intrastate commutation fares.

The amendment last mentioned contained the following provision:

> "* * * *Provided*, that no common carrier or other public utility shall make any general increase in its rates or charges which were in effect on September 15, 1942, unless it first gives thirty days' notice to the President, or such agency as he may designate, and consents to the timely intervention by such agency before the Federal, State, or municipal authority having jurisdiction to consider such increase."

In each case, evidence was submitted to the Commission in an effort to support the application for increased fares and the record was closed before September 15, 1942.

The Commission had not announced its decision or entered its order on September 15, 1942; and, even if an order had been entered, specific provisions of the Illinois Public Utilities Act empowered the Commission to vacate or modify its order on petition for rehearing or modification. (Illinois Public Utilities Act, Section 67, Illinois Revised Statutes 1943, Ch. 111 ⅔, Par. 71.)

Under date of October 14, 1942, James F. Byrnes, Director of Economic Stabilization, issued his Directive No. 1, by which he designated the Price Administrator of the Office of Price Administration as his representative to receive notices of increases in common carrier or other public utility rates and charges.

On November 12, 1942, the Office of Price Administration issued Procedural Regulation No. 11, which is set forth as Appendix I.

Notwithstanding the fact that the applications for increased rates were pending before the Commission at the time that the Act in question was passed, and at the time the directive and regulation referred to above were promulgated, none of the railroads (or their trustees) made it appear of record that they had notified the Price Administrator of their intent to put into effect any general increase in rates or charges, and that they consented to his timely intervention before the Illinois Commerce Commission.

In each of the cases the Illinois Commerce Commission construed the amendment to the Emergency Price Control Act as having such force, notwithstanding any law of the State of Illinois, as to make the Price Administrator in effect an indispensable party, at least to the extent that he must be notified, and given an opportunity to request, without opposition from the railroad, a chance to be heard in any proceeding contemplating an increase in intrastate public utilities rates.

Even if it should be held that the Commission was not *required* to forbear action until notice had been given, it is still contended that the Commission had a *right* to insist that we be notified. It is further contended that this right is of Federal origin, that it derives from the congressional exercise of war power, and that to construe the Illinois Public Utility law as imposing duties on the Commission at variance with this Federal right is to bring Illinois statutory law into conflict with the statutes and the Constitution of the United States.

The Commission also raises a question, deemed very substantial and highly important, as to whether the presently standing opinions, which forbid the Commission to scrutinize the entire operations of the companies, in effect command the Commission to fix rates without adequate evidence so as to deprive the patrons of their property without due process of law. The basis for this question will be indicated under that section of this statement devoted to showing that the Federal questions involved are substantial.

Specifications to the Stage of the Proceedings and the Manner in Which the Federal Questions Sought to Be Reversed Were Raised.

The Commission's assertion that it had no jurisdiction to grant the increase in rates involved in these proceedings was sought further in each case, respectively, in the Commission's final order.

In Illinois, the practice upon which is known as a "statutory appeal" to the circuit court or superior court does not contemplate the filing of written pleadings. The Commission's order and the record of the proceedings upon which such order was entered constitute the record upon which the case is heard in the trial court. At the time that this jurisdictional statement is being prepared, the record

has not been compiled and it is impossible to cite record pages. But the final order in each case is reproduced in an abstract of record in each case, which abstracts will be incorporated in the record on this appeal.

Since the Commission denied the increase here sought upon jurisdictional grounds and also upon its findings that the cases made by the carriers, respectively, did not entitle them to the increase, it was not necessary for the Commission, as a further and additional ground for such denial, to advert to the claim that to grant the increase would be to violate the due process clause. But in Illinois, the rule is well settled that an administrative order may be entered upon one ground and sustained upon any ground which will support it, even though such ground was not only ignored but may even be inconsistent with the ground assigned. (See *Clausen* v. *Department of Finance*, 377 Ill. 399, where the Supreme Court sustained an order imposing the Illinois Retailers' Occupation Tax upon a theory admittedly overlooked and suggested by the Department for the first time on appeal.)

In Illinois, assignments of error in the formal sense of the term are no longer used. However, Rule 39 of the rules of practice of the Supreme Court of Illinois requires that "the concluding subdivision of the statement of the case shall be a brief statement of the errors or cross errors relied upon for a reversal or of the cross errors submitted by an appellee not prosecuting a cross appeal." The same rule also requires that "the Statement of the case shall be followed by the propositions of law and the authorities relied upon to support them."

In each case, the Commission raised and argued both Federal constitutional questions in its briefs.

We particularly call this Court's attention to the fact that the Supreme Court of Illinois discussed appellant's

contentions, passing upon and rejecting them. It is therefore clear that the Supreme Court of Illinois in effect held that the questions were properly before it.

Showing That the Questions Involved Are Substantial

I

The question as to the effect of the emergency Price Control Act upon the jurisdiction of the Illinois Commission under the Illinois Public Utilities Act, is substantial.

The Supreme Court of Illinois, acceding to the contentions of the carriers and rejecting the contrary contentions of the Commission, has squarely held that "the failure to give such notice" (that is, the notice required by the Emergency Price Control Act and the regulations implementing it) "would not, in any event, affect the jurisdiction or power of the Commission or alter its duties in a matter of this kind."

The question whether the court was justified, not only in this holding that the Price Administrator had no right to intervene, but in holding further that *the Illinois Commission was not entitled, by Federal legislation, to insist that he be given an opportunity to request leave to intervene*, and was not entitled to hear, consider and, if it thought proper, act upon his showing and suggestions, is substantial. The considerations militating against the view expressed by the Supreme Court of Illinois may briefly be summarized as follows:

As this Court has perceived and expressly stated, although the Emergency Price Control legislation has directly and immediately applied the war power of Congress to virtually every commodity and service except the services rendered and commodities purveyed by public utilities, the Congress has forborne the immediate regulations, by

such emergency instrumentalities as the Office of Price Administration, of the rates of public utilities and has left the regulation of such rates to Federal and State Commissions in express contemplation thereon that such Federal and State Commissions can effectuate in full the Congressional policies (of stabilized prices) when such Commission has had the benefit of evidence, information and argument submitted by the Office of Price Administration.

In other words, Congress has granted a concession to public utilities—an exemption from the drastic and stringent regulation which has been imposed upon the prices of every other article and service in the country—upon the condition that, instead of obtaining the *direct approval and sanction* of the Office of Price Administration, as must every merchant in the country, such utility shall inform the Office of its intention to raise its rates and upon the further condition that the utility afford the Office, as the representative of the consuming public, of a nation at war, the opportunity to advise, by proof and argument, a State regulatory commission.

This is obviously a command—or at the very least, congressional authority—to every Federal and State commission to insist upon and receive the benefit of this representation of the public's interest in hearings conducted before it.

Is it not, then, clearly untenable to say that a State Commission not only has no duty but has not even the right to require the utilities to obey an act which, instead of preempting control of utilities' rates from the Commission, leaves such control with the Commission only upon the terms and conditions set forth in the act?

The logic and *rationale* of the Congressional policy seems clear to us. Congress was evidently of the view that State and Federal Commissions could better effectuate the stabilization policy than could the Office of Price Administra-

tion *provided that such State and Federal Commissions at least had access to the showing and argument of that agency primarily charged with perceiving the Nation's economy so far as possible, in time of war.*

In the Illinois Supreme Court, the Commission contended that the Illinois Public Utilities Act, which creates the Illinois Commission and from which the Illinois Commission derives not only its existence but all of its powers, should be construed as contemplating that, in the event of the exercise of Federal power enjoining duties or even merely conferring rights on the Commission, the Commission should be subject to those duties and entitled to those rights. The Supreme Court of Illinois, by declaring that "the failure to give such notice would not, in any event, effect the jurisdiction or powers of the Commission," has squarely held that the Illinois act does not contemplate that the Commission must or *even may, in its discretion,* insist that it will not grant an increase in prices which may be inconsistent with Federal policies until it has heard the spokesman for the Federal Government concerning that policy. In each of these cases, the Price Administrator asked leave to intervene in the Supreme Court of Illinois as *amicus curiae.* In each of these cases the Supreme Court of Illinois denied this leave.

This Court will not be required to decide in this case whether, had the notice been given and had the Director of Economic Stabilization sought leave to intervene, the Commission might have refused such leave. This is a case in which the Commission, acting in what it conceives to be obedience to congressional exercise of the war power and in what it conceives to be conformity with the Nation's military policy as articulated by Congress, refused to grant the price increases here sought without the benefit of the Federal Government's representations and arguments.

In short, we contend that the very least that can be conceded to the Commission under the congressional measures pertinent here is that the Commission had a right, conferred by Congress, to act, if it saw fit, in accordance with national military policy. The Commission asserted and claimed that right in its order. The right has been denied by the decisions of the Supreme Court of Illinois now under review.

Whether that right was properly or improperly denied presents a substantial and important Federal question.

II

The question whether the Illinois Supreme Court's decisions deprives the carrier's passengers of property without due process of law is substantial.

For many years carriers have had access to this Court upon the assertion of the contention, when there was reasonable basis in the record to sustain the contention, that a Federal or State Commission has confiscated their property without due process of law when an order has been entered with the sufficient evidence in the record, to support the denial of an increase or the command of a decrease in the carrier's tariffs. In this case, we seek to present, for the first time, so far as we are aware, the precise converse of that contention, namely, the contention that where the carriers fail to present substantial evidence justifying an increase, to set at naught an order denying such an increase, is to impose upon the carrier's patrons a confiscatory high rate.

We do not deem it appropriate to inflict upon this Court, under the guise of a suggestion of a substantiality of a Federal question, an exhaustive brief upon the merits of the question. We regard it as sufficient briefly to indicate the following considerations which were opposed to the

holding of the Supreme Court of Illinois and which we believe to be substantial.

In the earnest view of the Commission, the carriers imposed upon the Supreme Court of Illinois a sophistical reading of this Court's decision in *Northern Pacific Railway Co.* v. *North Dakota,* 236 U. S. 586. In that case, this Court held (and we do not challenge the holding) merely that a carrier may not be required to render one type of service at a loss because it is earning a fair or even an exclusive rate upon other types of service. In other words, to permit one class of traffic to move at less than a compensatory rate is virtually to make a gift of the Company's property to that class of traffic at the expense of other classes of traffic which move at a fair or perhaps an exorbitant rate.

The Commission does not challenge the holding of this case. It does, however, contend that nothing in that case is inconsistent with the position insisted upon here. That position is that the Commission could not determine whether the carriers were in fact sustaining a loss upon their commutation service without a perspective of the entire operations and fiscal economy of the companies. This position is briefly indicated later in these suggestions.

For these reasons, the Commission contends that the opinions of the Supreme Court of Illinois will, unless reversed, impose upon Illinois citizens, as upon transits so journeying in Illinois, rates of fare which have been demanded by the carriers without the showing requisite to due process of law.

All of the cases, though separately filed and docketed, were prosecuted upon substantially a similar theory although, of course, the evidence in each case was different, and it is evident that these carriers, as well as other carriers whose cases are not before this Court, sought the increases here in question as a concerted move. Hence the following

general observations are applicable to all of the five cases herein involved:

There was a fundamental and profound divergence before the carriers, on the one hand, and the Commission, on the other hand, upon a basic question, which question is regarded by the Commission as embodying an issue of Federal constitutional law. This question may be delineated as follows:

The carriers took the view that, because of their interpretation of this Court's teachings in *Northern Pacific Railway Company* v. *Department of Public Works of the State of Washington*, 268 U. S. 39, and similar cases, they were not bound to submit to the Commission a showing of their over-all earnings from (a) interstate freight; (b) intrastate freight; (c) interstate passenger service, whether suburban or non-suburban, whether commutation or non-commutation, or (d) other sources of revenue. It was the position of the carriers, which position was sustained by the Supreme Court of the State of Illinois, that, this Court having held in the Northern Pacific case that a carrier is not bound to render one type of service at a loss even though it makes a fair or even an exorbitant sum on other type of services, the Commission was not entitled even to scrutinize earnings from other sources.

Both the carriers and the Supreme Court of Illinois appear to have misunderstood the view of the Commission, which is *not* that a rate which is *in fact* confiscatory may be imposed upon a carrier with respect to one type of service merely because it is making a fair return or may be making an excessive rate upon other types of service. The Commission did and does contend, however, that, particularly in view of this Court's decisions in *Federal Power Commission* v. *Natural Gas Pipeline Company*, 315 U. S. 575, and *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S.

591, the Commission, in order to prevent the confiscation of the public's money, was not only entitled but was bound and required to view the carriers' operations of suburban commutation service against the perspective of the carriers' entire economy and fiscal policy. This inquiry was proper and necessary, not to inflict a low rate as to one class of service because of high rates as to other classes of services, but because the carriers' claim that present rates are confiscatory necessarily depended upon segregation, allocations and apportionments both with respect to invested capital and operating expenses, including, of course, the very important items of depreciation and retirements, upon a view of the entirety and totality of the carriers' operations.

The Commission conceives it to be its duty to the public, enjoined upon it by a proper reading of the Constitution of the United States, to prevent unjust discriminations between the various classes of service. Even if it should be granted (for the sake of argument only, of course) that a carrier was suffering a confiscatory loss with respect to one type only of its service, it would have no right to have that loss remedied if other types of service, such as, for instance suburban *non-commutation service* (that is single fare as distinct from multiple ride), were not subject to a corresponding revision downward. Indeed it might even be conceivable that by suffering a loss not only upon its suburban but upon some type of non-suburban service which loss would be reflected in the apportioned charges against capital and operating expenses, the total loss should be compensated by only a partial granting of the increase sought in the case of commutation service, and some revision upward of rates on some other branch of the service.

Furthermore, it was and is an important contention of the Commission that, although the carriers computed their loss by deducting from commutation revenue sums representing apportioned charges against capital and oper-

ating income, the Commission could not determine the propriety either of the total charge or of an apportionment assigned to commutation fares without having before it the entire panorama of the carriers' system and operations.

It has consistently been, and in this case will be, the position of the Commission that to visit upon the public an increase in tariff when such increase must necessarily be predicated upon a finding of apportionment of expenses and charges when the basis for that apportionment has not been presented to the Commission, would be for the Commission to make findings favorable to the carriers and adverse to the public without evidence and in violation of the due process clause of the Constitution.

But we do contend that when a Commission, in order to assure that a carrier's costs of operation and charges against capital shall be reasonably fairly distributed among all classes of traffic, holds, in effect, that it cannot in fairness to the public raise the rates for one class of traffic (in this case, intra-state commutation suburban traffic) by an amount arbitrarily fixed by the carriers at ten per cent without the *data* for a complete survey of the company's operations, a reversal by a State Supreme Court of such a holding has in substance denied the public that opportunity to have its interests considered which is the essence of due process of law.

It is obvious that such items as pertain to rights of way, through traffic stations, which also serve suburban traffic, general corporate taxes, real estate taxes, charges for the company's general personnel and many other items must be apportioned between commutation and other service if the public interest is to be fairly consulted. The presently standing opinions of the Supreme Court hold that the company's segregations and apportions were adequate. We submit that so to hold when the company's general opera-

tions were not before the Commission is in effect to command the Commission to make *fiat* holdings.

It is evident from a reading of the presently standing opinions that the Supreme Court of Illinois believed that it was following the dictation of this Court in the Northern Pacific case and similar authorities. We earnestly urge that the conflict between the view expressed in the presently standing opinions and the view indicated in these suggestions raises a substantial Federal question.

III

The Supreme Court of Illinois has decided a Federal question in a way properly in conflict with this Court's decisions.

As long as the Supreme Court of Illinois adheres to the view that the Commission could not deny an increase to the carriers on the present record because of that court's reading of this Court's decision in *Northern Pacific Railway Co.* v. *North Dakota,* already cited, 236 U. S. 586, it cannot affirm the orders of the Commission involved here. In other words, the Supreme Court's opinion holds squarely that, under Federal constitutional law, the carriers are entitled to the increase here sought.

We believe that the Supreme Court of Illinois has failed to give proper effect to this Court's teachings in its recent decisions in *Federal Power Commission* v. *Natural Gas Co.,* 315 U. S. 575 and *Federal Power Commission* v. *Hope Natural Gas Co.,* 320 U. S. 591. Those cases held, contrary to the decisions of the Supreme Court of Illinois, that a formula which has regard for the impact of the order does not deprive public utilities of their property without due process of law. We have already suggested the application of these cases to the instant case. We repeat our advertence to these cases under the present points simply to em-

phasize that, logically, the Federal question whether the Supreme Court of Illinois denied the public due process of law is distinct from the further Federal question as to whether the Supreme Court of Illinois has rightly interpreted this Court's opinion in the *Northern Pacific* case in the light of this Court's recent expositions of the appropriate constitutional doctrines.

We submit that this later question, namely, the question of the applicability of the Northern Pacific doctrine is a substantial Federal question.

Conclusion

For the reasons urged in these suggestions it is submitted that this Court has jurisdiction of these appeals and that substantial Federal questions are presented.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Appellants.